IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

FAO(HMA) No.396 of 2001.

Judgment Reserved on:19.07.2006

Date of decision: 26.07.2006

Shyam Sunder Gupta …..**Appellant**

Versus

Smt.Homa Gupta …..**Respondent**

Coram

The Hon'ble Mr.Justice Deepak Gupta, J.

Whether approved for reporting ?[1]

For the Appellant: Mr.Bhupender Gupta, Senior Advocate, with Ms.Charu Gupta, Advocate.

For the Respondent: Mr.R.K. Bawa, Senior Advocate with Mr.Rajpal Singh Thakur, Advocate.

Deepak Gupta,J.

This appeal by the husband is directed against the judgment and decree passed by the learned District Judge, Solan, in H.M. Petition No.33-S/3 of 1998, decided on 19.10.2001, whereby the court below has rejected the petition for divorce filed by the husband.

Briefly stated the facts of the case are that both the parties, who are educated and employed, were married according to Hindu Rites on 18.4.1986. Admittedly, they last resided together at Solan. The husband sought divorce from the wife on three grounds; (i) that she has deserted him for a period of two years

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

prior to the filing of this petition and was living separately since 22nd August, 1987 without any reasonable cause,; (ii) that she has treated the petitioner with cruelty and (iii) that despite earlier order for restitution of conjugal rights having been passed by the Sub Judge Ist Class, Karsog on 23.10.1989 in favour of the wife, there had been no restitution of conjugal rights.

The wife contested the petition and according to her because she could not bear a child the petitioner started taunting the wife and, therefore, wanted to get married again. She submitted that in fact she had been residing with the husband till about 6 to 9 months prior to the filing of the reply. According to her, the petitioner-husband has kept another woman by the name of Kamlesh and it was because of this reason that he wanted to divorce the wife. The stand of the wife was that she had not deserted the husband and in fact it was he, who had treated her with cruelty on account of the fact that she could not bear a child. It was alleged that when the wife objected to the filthy language used by the petitioner against her, he gave in writing that he will not repeat this act in future, but despite that the husband wrote many letters to the wife blaming her and cursing her for no rhyme or reason.

The parties led evidence and arguments were heard.

The learned trial Court held that the husband had failed to prove any of the grounds alleged in the petition and dismissed the petition.

The husband, aggrieved against the said judgment and decree, has filed the present appeal.

I have heard Shri Bhupender Gupta, learned Senior Counsel appearing on behalf of the appellant-husband as well as Shri R.K. Bawa, learned Senior Counsel appearing on behalf of the respondent-wife.

It is contended on behalf of the husband by Mr.Gupta, learned Senior Counsel for the husband, that it stands proved on record that the wife is living separately from the husband since 1987 without any reasonable cause. He further submits that the allegation made by the wife in the written reply as well as in her evidence that the husband is having adulterous relations with Kamlesh has not been proved by the wife and this act of levelling false and scandalous allegations against the husband itself amounts to cruelty. He further submits that under Section 13(1A)(ii), in case there has been no restitution of conjugal rights between the parties to the marriage for a period of one year or more after the passing of a decree for restitution of conjugal rights then either party to the marriage can present a petition for dissolution of marriage on this ground.

On the other hand, Mr.R.K. Bawa, learned Senior Counsel for the respondent, contended that there are no details with regard to cruelty and there is only a vague

allegation of desertion. He submits that both the spouses were working and earning and therefore, it was not only the duty of the wife to go to the house of the husband, but the husband should have also made an attempt to go to the place of posting of the wife. He further submits that there is malafide intention in filing the petition since the husband has illicit relations with Kamlesh. He submitted that the wife has proved that the husband has illicit relations with Kamlesh. In the alternative, he submits that there was a justifiable ground for the wife to level such allegations and even if the allegations are held to have not been strictly proved, it cannot be said that the petitioner has made reckless or wild allegations amounting to cruelty.

I have given my careful consideration to the arguments led by both the counsel and have gone through the record of the case.

The husband is an employee in the Courts, whereas the wife is a teacher in Balwari Institution. Both remain posted at different stations, as is evident from their own statements and the statements of the witnesses. According to the husband, initially the wife used to come and meet him on weekends. In 1987 he was transferred from Solan to Nahan. According to him, the wife visited him at Nahan once or twice and then also she quarreled with him and she stayed with him at Nahan only for 20 to 25 days. He states that she never did the house work etc. According to him, after 22nd August,

1987, both of them have been living separately. He states that the wife had filed a petition for restitution of conjugal rights against him in which she made false allegations that he had demanded dowry in the form of Television and money from her. The said petition was decreed in favour of the wife on 23.10.1989. Despite this decree, they never lived together. He further states that he lived in Nahan from 1987 to 1991 when he was transferred to Arki where he remained up to July, 1991 and then he was transferred to Solan. He remained in Solan from 1991 to 1993 when he was again transferred to Arki, where he remained till 1995. Thereafter he was again posted at Solan. According to the husband the wife never resided at any of these stations with him. He states that when he was posted at Arki in 1995, he remained ill for three to four months and during this period neither his wife nor her relatives ever came to ask about his well being or to look after and care for him. He remained in hospital all alone and only his neighbours looked after him. He has denied the suggestion that prior to his marriage with the respondent he was married to one Kamlesh. He further denied the suggestion that at various places where he remained posted the wife used to regularly come and meet him. He has denied the suggestion that since he has illicit relations with Kamlesh, therefore, he wants to divorce the wife.

PW-2, Tulsi Ram, and PW-3, Ajay Kumar, are the witnesses from Arki who were on friendly terms with the petitioner-husband when he remained at Arki from 1993 to 1995. According to them, he always lived alone and they never saw his wife at Arki. It is also stated that in 1995 when the husband fell ill and was admitted in TB Hospital at Dharampur, the wife did not come and it was PW-3 who had taken the husband to hospital and looked after him there.

PW-4 is the neighbour of the husband since 1995 and according to him, since 1995 he has never seen the wife living with the husband. PW-5 was a friend and neighbour of the petitioner at Nahan where he remained posted from 1987 to 1991. PW-6 is the daughter of the husband's landlady at Nahan. According to these witnesses, the husband and wife did not live together at Nahan also. PW-6 in whose mother's house the petitioner was living has categorically stated that in her presence the wife only came once to Nahan earlier in 1987 and thereafter never came to Nahan. PW-7 knows the husband for a long time. According to him, he was on visiting terms with the petitioner-husband. Even when they were living together the wife never did any work and used to pass sarcastic remarks against husband. PW-8 was the landlady of the petitioner at Solan from 1991 to 1993. According to her, she never saw the wife living with the husband during this period.

RW-1 is the wife. She states that she used to live with the husband at the various places where he was posted from time to time. She further states that after the petition for restitution of conjugal rights was filed and decreed in her favour by the Sub Judge at Karsog, the parties reconciled and started living together. She further states that she used to come from her place of posting to her husband's house on weekends and once when she landed suddenly at the quarter, she found one girl, namely; Kamlesh in the house. According to her, now a son has been born to Kamlesh from the loins of the petitioner. She further states that she used to do the entire house work and she never treated her husband with cruelty. She states that initially she was posted at Jubbal and she used to visit her husband from there. She states that the husband used to ask her to get herself transferred to the place of his posting. She has denied the suggestion that she has ever made false allegation that the husband ever demanded Rs.50,000/- from her. She could not produce the letters or writings regarding which she has made allegation in her reply.

RW-2 states that he knows the parties and he had seen the respondent living with the husband in the house of Krishan Murari Sharma about 8-9 years earlier. However, in cross-examination he states that he does not know when the husband shifted to the house of Krishan Murari Sharma.

RW-3 is Inder Devi. She lives in Saproon near the house of the husband. According to her, since 1996 she knows the parties. According to her, the wife has been living with the husband till 1999 on week ends and holidays. She further states that the parties used to quarrel over one girl called Kamlesh. In cross-examination she could not say in which Department the wife is working or where she is posted.

RW-4, Kamla Devi, is also a resident of Saproon and according to her, she has seen the parties living together. In cross-examination she states that she had last seen the parties together 14 years earlier and thereafter she does not know where they went.

RW-5 is Hari Singh, who has brought the record of the holidays of the wife. Reliance is placed on the record produced by him especially Ex.RW-5/A and Ex.RW-5/B by which leave applications, the applicant had taken leave in December, 1991 and April, 1994 to attend upon her ailing husband.

RW-6 is one Chamel Singh who belongs to village *Banah* in Tehsil *Pachhad*, District Sirmaur. He is the *Pradhan* of the Gram Panchayat, Banah and according to him, one Kamlesh daughter of Jagmohan Singh is married to Shyam Sunder Gupta. He does not know who is Shyam Sunder Gupta and he further states that he has heard that one child has been born to Kamlesh. In cross-examination he admits that the village of Kamlesh is more than two kilometers away from his village. He states that in the

village of Kamlesh there are 6-7 houses. He could not state as to where the other girls of the said village were married. He has admitted that his entire statement is based on hearsay and he has no personal knowledge.

RW-7 Virender Kashyap has brought the record of the CHC Medical Health Centre, Sarahan. According to him, as per entry at Serial No.60 of the Birth Register a male child was born to one Kamlesh wife of Shayam Sunder Gupta on 17.2.1990. This is the entire evidence on record.

In my view, the husband proved that right from 1987 when he was posted at Nahan, the wife never lived with him. The wife only visited him once or twice at Nahan. The husband has produced as witnesses, his neighbours and friends from Nahan, Arki and Solan to prove that right from 1987 till the filing of the petition they never saw the wife living with the husband. Even in a situation where the husband and wife are posted at different places, the wife is expected to visit and join her husband at his place of posting on some occasions. There may be a corresponding duty on the husband also. However, it must be shown that they lived together for sometime or the other. In the present case, the evidence led by the husband leaves me in no manner of doubt that the wife and husband have been living separately since 1987. In fact the version of the wife that they have been living together cannot be accepted. If they had been living together why should she have

filed the petition for restitution of conjugal rights? After the petition of restitution of conjugal rights was filed, the parties, in my opinion, have not lived together. No doubt the wife and some other witnesses have stated that they lived together. But, if the evidence is gone into detail, the case of the wife is not supported. The statement of RW-2 was recorded on 17.7.2000. According to him, he saw the wife in the house of the husband 8-9 years earlier. Even the statement of this witness shows that for the last 8-9 years the husband and wife are not residing together. RW-3 Inder Devi no doubt supports the wife. However, her statement does not inspire confidence, since she could not even state where the wife was posted or where she was working. It is only those persons who are friendly with the husband and wife who would have knowledge with regard to their relations. RW-4 admittedly has not seen the parties living together for 14 years prior to 2000 i.e. 1986-87. Therefore, it stands proved that the wife is living separately since about 1987.

The question that arises is whether wife has any reasonable cause to live separately?

The wife has in fact not pleaded any reasonable cause for living separately since according to her till about six to nine months prior to the filing of the petition both the parties were living together. She has not given any reason as to why she remained separate from the husband from 1987 onwards. In her reply she has

stated that the husband had given in writing that he would not use filthy language against the wife and that he had written various letters to the wife cursing her and blaming her for nothing. If these documents had been proved the wife could have been justified to live away from the husband. However, what to talk about proving such documents, no such documents have even seen the light of day.

Another aspect which has to be kept in mind is that the husband remained ill when he was posted in Arki in 1995. The husband and his witnesses have stated that the wife never came to lookafter him. He was admitted in the TB Hospital at Dharampur, but still the wife did not deem it proper to attend to him at Dharampur. In fact in her statement also the wife has not specifically stated that she looked after her husband at Dharampur. No doubt the leave applications Ex.RW-5/A and Ex.RW-5/B show that the wife had taken leave to attend upon her husband. But, these are only applications for leave and they are not supported by any other material to show that the wife actually after availing leave looked after the husband.

The other ground given by the wife is that the husband has some adulterous relationship with Kamlesh. This, in my opinion, has not at all been proved. No person living in the vicinity of the husband has been produced. None of his neighbours, associates or colleagues have been produced to prove that there is some other woman staying with the husband. In fact the

complete identity of Kamlesh was not disclosed in the written reply and it is only in the statement of RW-6, that the identity of Kamlesh is disclosed. This witness, however, admits that whatever he has stated in examination-in-chief is based on hearsay and, therefore, his statement is totally inadmissible in evidence. With regard to Ex.RW-7/A, it will be pertinent to mention that neither the identity of Kamlesh nor the identity of Shyam Sunder Gupta mentioned in the said record has been established. In fact no proper evidence has been led to show as to who was this Kamlesh who delivered the child at Sarahan and who was Shyam Sunder. A very serious allegation had been made that the husband was living in adultery and if this was to be proved some proper evidence should have been led. This has not been done.In my view, the husband has been able to prove that the wife deserted him.

It has also been proved on record that the parties did not cohabit after the passing of the decree for restitution of conjugal rights.

The right conferred under Section 13(1A)(ii) to obtain divorce on account of the fact that there has been no restitution of conjugal rights even if a decree under Section 9 has been passed is not only available to the party which has obtained the decree for the restitution of conjugal rights but also to the party against whom such decree was passed.

In fact the wife did not even deem it proper to apply for execution of decree. This also shows that her intention was not to live with the husband.

After the decree for restitution of conjugal rights was passed, the parties in my opinion did not cohabit at all. This gave right to any one of the parties to the said petition to apply for divorce after a period of one year of the passing of the decree for restitution of conjugal rights on the ground that the parties had not cohabited during this period. On this ground also, the petitioner is entitled to divorce.

In my opinion, though the husband did not prove cruelty as alleged by him in the petition, the allegations of the wife leveling false allegations of adultery against the husband itself amount to an act of cruelty and the wife should have either proved the same or should have led evidence to show that she had reasonable grounds for making such allegations. In my opinion, the wife in fact has not made out any justifiable ground to level such allegations and these allegations are false and defamatory in nature. Therefore, this act of the wife amounts to cruelty.

Reference in this behalf may be made to the judgment of the Apex Court in ***Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate, (2003) 6 SCC 334.*** In fact the allegation apparently appears to be false because at one stage it is stated that Kamlesh was the previous wife

of the husband and lateron it is alleged that he had an adulterous relation with Kamlesh.

In my opinion, the petitioner-husband in this case has been able to prove all the grounds. He has proved that the wife has deserted him; the allegations leveled by the wife that the husband is having adulterous relationship are proved to be false. These allegations are defamatory and scurrilous in nature and amount to an act of cruelty. In my opinion, the wife has no justifiable reasons to level such allegations; and lastly the husband has also proved that he is entitled to divorce under Section 13(1A)(ii) since after the decree for restitution of conjugal rights was passed there has been no actual cohabitation between the parties for a period of more than one year after the passing of the decree.

Keeping in view of the aforesaid circumstances and discussions, the appeal of the husband is allowed. The judgment and decree passed by the learned trial Court is set aside and the marriage of the parties is dissolved by granting a decree of divorce. Decree sheet be drawn up, accordingly. No costs.

July 26, 2006 **(Deepak Gupta)**
(aks) **Judge.**